



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, WA 98101

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Reply To
Attn Of: OW-131

James W. Balsiger
Administrator, Alaska Region
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National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802-1668

David Allen
Director, Alaska Region
U.S. Fish & Wildlife Service
Ecological Services
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Anchorage, AK 99503-6199

Dear Mr. Balsiger and Mr. Allen:

On September 28, 2001, EPA approved certain revisions to Alaska's water quality standards subject to the results of consultation under section 7 of the Endangered Species Act (ESA). As you know, our practice in the past has been to complete consultation before proceeding with approval. The purpose of this letter is to explain our decision and to discuss some next steps.

The revisions to Alaska's water quality standards include adoption of eight EPA-derived aquatic life criteria, a compliance schedule provision, new definitions, and minor wording changes to the whole effluent toxicity limit and the site-specific criteria provision. These revisions were submitted to EPA two years ago and have been awaiting our review and action under the Clean Water Act (CWA). We believe that having these revisions in effect generally is advantageous, or at least will have no effects of concern to listed species.

There are two primary reasons for our departure from our previous commitment to consult before proceeding with approval. First, a recent change in the regulatory structure for approving water quality standards has heightened the importance of expeditious action on water quality standards by EPA. Second, we are acting to carry out our Agency's commitment to take action on the current backlog of water quality standards submittals.

Regulatory Change

In 1996, a coalition of environmental groups sued EPA, alleging that EPA was violating the Clean Water Act (CWA) by applying new and revised water quality standards adopted by Alaska before EPA had approved the standards. In 1997, the U.S. District Court for the District of Washington (the Court) issued an opinion in this case holding that the plain meaning of CWA section 303(c)(3) was that new or revised State water quality standards did not become effective for CWA purposes until approved by EPA. The parties to the lawsuit entered into a settlement agreement under which EPA agreed to revise 40 CFR 131.21(c) consistent with the Court's opinion.

On May 30, 2000, EPA completed a revision to the federal water quality standards regulations which determines when state adopted water quality standards go into effect for CWA purposes. This revised regulation, commonly known as the "Alaska Rule," clarifies that state and tribal water quality standards are not effective as a federal matter until EPA approves them. This is a significant change from the former situation, in which state/tribal water quality standards were considered effective as a federal matter immediately upon legal adoption by the state. The Alaska Rule means that far greater significance now attaches to timely and expeditious EPA action on water quality standard submissions. The need for expeditious action will present an enormous challenge to EPA given the complexities of standards, and necessitates that we reassess our strategy for complying with ESA requirements under section 7.

Backlog of Water Quality Standards Submittals

A critical first step in responding to the Alaska Rule involves addressing the backlog of standards revisions so that we may better focus our efforts on future submittals. Nationally, EPA is working to eliminate a backlog of water quality standards revisions that State's and Tribes have submitted to EPA that have yet to be acted upon. Elimination of this backlog is important because revisions to standards that represent an increase in stringency will generally not be implemented through federal national pollutant discharge elimination system (NPDES) permits until approved by EPA. More specifically, the Alaska revisions include the adoption of five more stringent aquatic life criteria and the adoption of three criteria for which there were no numeric criteria previously. The five more stringent criteria and the three new criteria can not be used for CWA purposes until they are approved by EPA. Therefore, EPA is working to clear this submission.

EPA's Endangered Species Act Section 7(d) Policy

We believe this approach to acting on water quality standards revisions is consistent with Section 7(d) of the ESA because it does not foreclose formulation or implementation of alternatives that might be determined appropriate as the result of ESA consultation. By approving the standards "subject to the results of consultation under section 7(a)(2)," EPA clearly announces that it has retained the discretion to revisit and revise as determined to be appropriate through the ESA consultation process. In such a situation, there will be no irreversible or irretrievable commitment of resources, and EPA will retain the full range of options available under section 303(c) for ensuring water quality standards are protective of beneficial uses and listed species.

EPA remains committed to fulfilling our responsibilities under the ESA and to work with the Services to ensure that the water quality standards we will soon be approving are protective of the species and their habitat as intended by the ESA. We prepared a draft Biological Assessment, prior to the approval for the standards referred to above. In the near future, we will be providing the biological assessment to your respective field offices for review.

EPA's Evaluation of the Environmental Impacts of the WQS Standards Revisions

This approval action contains three categories of changes. The first category is the adoption of more stringent standards or the adoption of standards where none existed before. The second category of change is adoption of criteria less stringent than prior standards. The third category of changes are those where there is no difference in stringency between the new and existing standards

In the first category of changes, Alaska has adopted several more stringent water quality standards than previously existed for surface waters in Alaska. Alaska has adopted more stringent numeric criteria to protect aquatic life in freshwater and marine waters for nickel (acute), selenium (acute and chronic), zinc (acute), pentachlorophenol (acute), toxaphene (acute), and freshwater pH. These six, more stringent, criteria that were approved by EPA enhance the protection of aquatic ecosystems, including listed species dependent on them. Alaska has adopted three new criteria and two new definitions to protect aquatic life that did not exist in the WQS regulations before these revisions. Prior to these revisions, Alaska had no aquatic life criteria for freshwater chloride, freshwater aluminum, and marine ammonia. By adopting these three criteria, Alaska now has a basis to consistently regulate these pollutants. EPA believes it is better from an environmental standpoint generally, and with regard to the protection of listed species/critical habitat in particular, to have the more stringent water quality standards as well as the new water quality standards in place pending the completion of consultation rather than retaining the older, less stringent standards or having no regulatory controls over certain pollutants (chloride, aluminum, ammonia).

The marine pH criterion and the compliance schedule provision fit in the second category of changes. Alaska has adopted a marine pH criterion that is consistent with EPA's recommended criterion but it is less stringent than the criterion that Alaska had prior to these revisions. EPA believes that the new revised pH criterion being approved by EPA is adequately protective of listed species/critical habitat and will not result in impacts of concern. The compliance schedule provision fits into this category because it allows criteria to be exceeded for a limited period of time in certain situations. EPA believes that approval of this provision will adequately protect listed species/critical habitat during the interim period while consultation is completed because EPA will independently consult on the site-specific implementation of this provision when a National Pollutant Discharge Elimination System permit is issued.

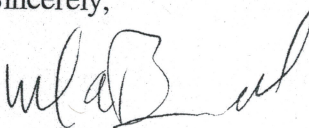
The third category of changes involves revisions where there is not a difference in stringency between the new and existing standards. The revisions to the WET provision and the site-specific criteria revisions fit in this category. EPA's approval of these revised standards will not cause any impacts of concern to the species/critical habitat during the interim period until consultation is concluded. The new/revised standards do not change the level of protection afforded to waters in Alaska.

Next Steps

As for consultations on future standards revisions, I believe the best course is for the Services to become involved in the standards development process as early as possible. ESA considerations should be articulated at a stage in the process when the standards may still be changed prior to submittal to EPA. This in turn will facilitate a more expeditious consultation process, and will increase the likelihood that consultations may be completed within EPA's statutory deadline for action on submittals. EPA and Alaska Department of Environmental Conservation (Alaska DEC) are initiating discussions on strategic workload planning. The first step in this process is for Alaska to prepare a list of standards revisions that are being considered during the next three to five years. With the list of potential standards revisions as a starting point, our concept is that we can begin strategic workload planning among EPA, Alaska DEC, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. Consideration of the limited resources of all four agencies to work on standards revisions is an important factor in this workload planning effort.

In closing, I would like to reaffirm our commitment to working with you to ensure that requirements of the ESA are met as EPA reviews and acts upon State water quality standards. While the Alaska Rule necessarily changes the timing of our approach to integrating ESA consultation with water quality standards approvals, it does not in any way lessen our commitment to working with you to ensure the protection of threatened and endangered species. Please feel free to contact me at (206) 553-1261 or Sally Brough of my staff at (206) 553-1295 if you have questions concerning this letter.

Sincerely,


Randall F. Smith
Director, Office of Water

cc: Jeanne Hanson, NMFS Anchorage
Theresa Woods, USFWS Juneau
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